



**Keith L. Seat**  
Senior Counsel  
Federal Advocacy

1133 Nineteenth Street, NW  
Washington, DC 20036  
202 887-2993  
Fax 202 736-6492

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By Electronic Filing

Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: EX PARTE – WC Docket No. 03-10: Application  
by SBC Communications, Inc. for Authorization to  
Provide In-Region InterLATA Services in Nevada

Dear Ms. Dortch:

SBC continues to push Track A arguments that seek to render that statutory provision meaningless. It attempts to defend through bluster and rhetoric positions that cannot be supported by any reasonable reading of the Act. SBC must withdraw its application or have it rejected by the Commission, and reapply after it has helped facilitate local entry by a bona fide Track A provider, such as WorldCom.

SBC continues to argue that pure resellers count for purposes of Track A even though that argument is flatly inconsistent with the statutory language and statutory purpose, as WorldCom has previously explained at length.<sup>1</sup> Even more amazingly, SBC continues to defend the proposition that it satisfies Track A based on two carriers which do not offer service to residential customers who might wish to choose them and which even SBC claims have only a couple dozen residential customers each. These carriers are not competing with SBC as required by Track A. Indeed, the few customers that one carrier serves are apparently test customers – despite SBC's unsupported assertion to the contrary – and the customers of the other carrier are purchasing business services and

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<sup>1</sup> SBC argues that the Commission has permitted UNE-P providers to count for purposes of Track A even though they may not fulfill the statutory purpose any better than resellers. SBC Supplemental Reply Comments at 8. But that argument ignores the statutory language distinguishing between any facilities-based service and resale service. It also ignores that UNE-P providers, unlike resellers, potentially can move from UNE-P to UNE-L service or pure facilities-based service. In any event, CLECs argued against counting UNE-P providers as relevant for Track A. The Commission disagreed based on the BOCs' argument that UNE-P providers should count. But the conclusion that UNE-P providers are facilities-based providers for purpose of Track A does not justify extending Track A to pure resellers, which are clearly not predominantly facilities-based providers.

thus cannot be considered residential customers.<sup>2</sup> More fundamentally, Track A would fail its fundamental statutory purpose if a BOC could satisfy it by pointing to carriers with a handful of customers that do not offer any alternative to other customers.<sup>3</sup> SBC never explains the point of Track A under its reading.

SBC's only serious argument that it has met the requirements of Track A is based on the PCS service provided by Cricket. SBC contends that so long as it shows that more than a de minimis number of customers have substituted PCS for wireline service, it has met Track A of the statute. That is not so. The Commission adopted the "more than de minimis" standard for wireline service, but not for PCS service. It indicated that at least a showing of "significant" substitution would be required for PCS service. Louisiana II Order ¶ 40. And this only makes sense. While the "more than de minimis" standard may help facilitate the statutory purpose as applied to wireline providers, it does not do so as applied to PCS providers.

The purpose of the Act is to ensure that local competition is developing, so that consumers have a real alternative to the BOC. Competition is needed to discipline prices and ensure quality service. Track A helps facilitate that purpose by ensuring the existence of a facilities-based provider in the market. In determining how established such a provider must be to satisfy Track A, the Commission has adopted the more than de minimis standard for wireline providers. This is reasonable, for a wireline provider that serves more than a de minimis number of customers likely will at some point be able to discipline the prices that can be charged by the incumbent – even though, as DOJ notes, it does not guarantee that the provider can do so today. Because consumers would readily consider substituting the wireline service offered by one provider for that of another, a wireline provider that is serving even a relatively few customers almost certainly serves as an alternative for many more. If the BOC increases its rates or decreases quality, consumers would have an alternative to which they can turn. Moreover, it is reasonable to assume that a provider that has truly entered the market will expand to offer service to even more customers, because a facilities-based provider of wireline service will rarely, if ever, enter a state with the intention of limiting its geographic reach to only a very small area.

But it is not reasonable to make the same assumptions for PCS. The fact that a small number of customers have chosen to substitute PCS service for wireline service does not ensure that the PCS provider either now or in the future could serve to discipline the prices charged by the incumbent or could challenge the BOC with respect to quality of service. That is because the technological differences between PCS and wireline service mean that many customers are unlikely even seriously to consider substituting PCS for wireline service. The modest proportion of customers that have substituted PCS

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<sup>2</sup> SBC's willingness to stretch the statute to the breaking point is evidenced by its argument that all customers who receive service at residences are residential subscribers. SBC Supplemental Reply Comments at 5. But DS-1 and other services for which business rates are charged (which is all the second CLEC provides) are business services, and are generally provided for use in home-based businesses or for telecommuting.

<sup>3</sup> This is far different than a BOC's reliance on an established competitor that serves many thousands of customers, much less the "million customers" postulated by the Commission in its Arkansas/Missouri Order, ¶ 119.

for wireline service may in fact show that the great majority of consumers would not switch – and SBC has provided no evidence to suggest that they would. Indeed, many may not even receive sufficiently high quality PCS signals in their homes to consider substitution. Moreover, many of these customers may be in a niche market – such as singles, who do not desire all of the functionality that can only be supplied through wireline service.<sup>4</sup> The vast majority of customers for whom these technological limitations matter more likely will not consider substitution of PCS for wireline service. Further, the geographic limitation of PCS is much more dramatic than wireline, especially UNE-P service (which is limited only by SBC’s UNE rates). Attempts to expand PCS would encounter long delays to provide towers and all the unique facilities required for PCS beyond the few locations where it is now available in Nevada, even apart from thorny issues of raising capital.

In addition, a secondary purpose of Track A in the statute is to help confirm that a BOC has met its checklist obligations so that a competitor can enter. The existence of a facilities-based wireline provider with more than a de minimis number of customers provides some significant evidence that the BOC has met its requirements under the checklist, but the existence of a PCS provider does not. A PCS provider might be able to enter the market without the BOC unbundling any elements, for example.

That does not mean that a BOC can never rely on a PCS provider to meet Track A. The Commission has explained that the fact that the Act explicitly excludes cellular providers from consideration under Track A shows that PCS providers do count under Track A. But this same statutory exclusion also shows that PCS providers are on the margins of Track A, as they are very similar to the cellular providers that Congress excluded altogether. Thus, it is clear that a BOC relying on a PCS provider to meet Track A must meet a higher standard than a BOC relying on a wireline provider. Indeed, if a BOC could satisfy Track A simply by pointing to the existence of a more than de minimis number of PCS customers who were using PCS instead of wireline service, Track A would serve absolutely no purpose in the statutory scheme. The fact that a couple dozen customers (sufficient to satisfy the more than de minimis standard according to SBC) had substituted PCS for wireline service would say nothing about the state of competition today or the likelihood that the PCS provider could in the future serve as a real alternative to the BOC.

That is why the Commission has required at least “significant” substitution of PCS service for wireline service in order to meet the requirements of Track A. Louisiana II Order ¶ 40. This standard is evident not only from the words of the Louisiana Order, but also from the facts on which that Order was based. In ¶¶ 36-37 of the Order, the Commission discusses BellSouth’s M/A/R/C study and points out why BellSouth’s extrapolation from that study might have been overstated. But even without any extrapolation, the study reveals that some 16 people (personal rather than business users) who responded to the survey said they were substituting PCS for wireline service, while some 65 used PCS to make and receive calls at home “instead of using wireline”

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<sup>4</sup> SBC’s evidence shows that not all consumers who have substituted PCS for wireline are young, but does not consider other relevant demographics of the marketplace. It seems clear that broad swaths of the market, such as families who need the constancy of a phone that is always at home (complete with a home phone number), are unlikely to consider PCS as a substitute for wireline service.

(M/A/R/C Study, Table 8), and some extrapolation from the study was likely warranted. According to SBC, these customers alone should have been well above the number needed to satisfy the de minimis standard. The Commission found this evidence insufficient, however, showing that the more than de minimis standard does not apply to PCS.

As noted above, the Commission has required at least significant substitution of PCS for wireline service for purposes of Track A, and should now flesh out the standard. Because it is not clear that a PCS competitor, unlike a wireline competitor, provides a real alternative to the BOC for many customers beyond those it already serves, the Commission should conclude that a BOC that wishes to rely on PCS to prove it has met Track A must show that consumers are willing to substitute PCS for wireline service to such an extent that PCS and wireline service are in the same product market under traditional antitrust principles. While DOJ properly indicates that the Commission's analysis of Track A in the wireline context has not mirrored traditional antitrust principles and has not ensured that customers would currently switch their service in response to a small but significant and nontransitory price increase (DOJ Eval. at 9), we have explained why this is reasonable in the wireline context. In particular, there is reason to presume that a facilities-based wireline provider will in the future serve such a role even if today it serves only a small number of customers, for there is no doubt about the product market. But because this is not the case with PCS providers, the Commission should demand that the BOC show that consumers would be willing to switch to PCS in sufficient numbers to make a BOC price increase unprofitable.

SBC does not show that PCS is in the same product market as wireline service and could not even meet a lower standard. It does not come close to showing that a significant number of customers are willing to replace wireline with PCS service. SBC simply posits that 2842 Cricket customers are using Cricket as a replacement for wireline service.<sup>5</sup> That is only about 1% of the customers in SBC's Nevada territory (DOJ Eval. at 8) and 19% of all PCS customers, indicating that four out of five PCS customers have not substituted their wireline service with PCS, based on SBC's survey. Moreover, the Commission should be particularly demanding in its assessment where, as here, the BOC is relying on a single facilities-based provider to meet the requirements of Track A and that one provider is in serious financial trouble. Although SBC claims that the Commission should only assess the market at the time of the application, the standard the Commission relies on for Track A is based in part on a policy judgment. And that judgment should surely be different where the continued existence of a facilities-based alternative to the BOC is nebulous.

Moreover, it is very unlikely that the number of Cricket subscribers that are using PCS as an alternative to wireline service is as high as SBC claims. As WorldCom has explained, it is doubtful that customers would understand the meaning of "wireline" in

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<sup>5</sup> Of course, SBC did not even present real evidence of substitution of PCS for wireline service until its Reply Comments, well after the state's consideration of Track A. SBC says that the state still has time to comment on this evidence. SBC appears to think that the state commission must react to SBC's timing, responding in a short time frame to SBC's out-of-sequence evidence. That is inconsistent with the Commission's longstanding complete-as-filed rule. There is no reason that SBC could not have presented its new evidence earlier.

SBC's survey questions. Customers were only provided a definition of that term if they expressed confusion, and that definition itself might have heightened confusion. Frederick Aff. ¶ 11 n.5. Many customers might have incorrectly thought they knew what wireline service was and thus not asked for a definition – or they might mistakenly have believed the questions were about whether Cricket had replaced their traditional “wireless” service rather than wireline service. After all, wireless service is a far more common term, but the two terms sound similar. Even those customers who expressed confusion and obtained a definition might have remained confused. As WorldCom noted previously, many customers likely believed cordless phones were excluded from the definition of wireline service, as the definition requires that the phone be plugged into a wall jack. Unfortunately, when dealing with consumers confused by telecom terminology it may not be a safe assumption that their answers are reliable.

Worse, the survey uses a format to suggest to the Cricket users the very result that the survey is trying to prove. Before asking the key questions to the consumer about whether they have replaced their wireline phone with Cricket service, the interviewer states, “Some Cricket customers might choose to NOT have traditional wireline local telephone service in their home and, instead, use their Cricket phone for all of their calling needs.” Frederick Aff. ¶ 11 (emphasis in original). After receiving this suggestion from the interviewer, it is not surprising that moments later some customers answered that they had disconnected their wireline service because they decided to have a Cricket phone.

SBC suggests that it is somehow unfair to keep it out of long distance in Nevada based on Track A. But it is not would-be competitors' fault that competition has developed so slowly. As WorldCom has explained, SBC's prices in Nevada are significantly higher than the California benchmark. The loop rates are 19 percent higher, and the non-loop rates are 95 percent higher than cost-adjusted rates in California. In yet another example of SBC desperately stretching the truth, SBC argues that the Nevada rates are based on the model WorldCom advocated, but SBC neglects to say that the Nevada Commission varied the inputs to that model from the ones that WorldCom advocated, which resulted in rates that are worse than those CLECs sought.

In any event, WorldCom is in the process of entering Nevada, so there is no need for the Commission to adopt a new Track A theory this late in the section 271 process. Instead, the Commission should demand that SBC reapply for section 271 authorization based on the new WorldCom entry. This will give SBC an incentive to ensure that WorldCom's local entry does not face needless barriers.

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Pursuant to the Commission's rules, I am filing an electronic copy of this letter and request that it be placed in the record of this proceeding.

Sincerely,

Keith L. Seat

cc: Christopher Libertelli, Matt Brill, Emily Willeford, Lisa Zaina, Jessica Rosenworcel, Jeffrey Carlisle, Rich Lerner, Pamela Arluk, Pamela Megna, Ann Stevens, Tracey Wilson, Qualex International, Brianne Kucerik (DOJ), Charles Bolle (NPUC)